**Jerry Cardullo Ironworks, Inc. *and* Shopmen's Local Union No. 455, International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers, AF–CIO.** Cases 29–CA–24655, 29–CA–24907, 29–CA–25169, 29–CA–25263, and 29–CA–25322

September 30, 2003

## DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On May 30, 2003, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

### AMENDED REMEDY

Substitute the following for the second paragraph in the remedy section of the judge's decision:

"The Respondent shall be ordered to execute the 2002–2005 collective-bargaining agreement requested by the Union on September 25, 2002. The Respondent further shall be ordered to comply with the terms of the agreement retroactive to July 1, 2002, the effective date of the agreed-upon collective-bargaining agreement, described above. To the extent that the Respondent has failed to comply with the terms of the above-described contract, it shall be ordered to make whole its employees for any loss of earnings and other benefits they may have suffered as a result of that failure. Also, to the extent that the Respondent has failed to make payments to any benefit funds in the amounts required by the above-described contract, it shall be ordered to make such funds whole in accordance with the terms of that contract, including paying any additional amounts applicable to such delinquent payments in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure, if any, to make such required payments or contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All payments to unit employees shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987)."[3]

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Jerry Cardullo Ironworks, Inc., Bayshore, New York, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide the Union, upon request in the spring of 2001 and August 2001, the names, dates of hire, classifications, and rates of pay of unit employees; upon request in March 2002, the names and dates of hire of all unit employees, including those on layoff; upon request on April 11, 2002, a list of job functions performed by each unit employee during the past 3-year period, a list of vacation, holiday, sick leave, and overtime pay received by each employee during the past 3-year period, records showing medical coverage supplied by the Respondent to unit employees, including copies of individual employees' medical cards, and a list of benefit payments made to unit employees during the last 3 years; upon request on September 4, 2002, a list of unit employees who received unilateral wage increases, and the amount of such increase during August 2002; all of which information is relevant and necessary for the performance of its duties as the collective-bargaining representative of the employees in the following bargaining unit:

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We hereby correct two inadvertent errors in the judge's discussion of John Miranda's employment history with the Respondent. Miranda took two leaves of absence during 2001, and was refused reinstatement on his request in November 2001.

[2] We shall amend the judge's remedy, modify the recommended Order, and substitute a new notice to conform to the Board's standard remedial language and the facts of the case.

[3] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

> All production and maintenance employees including plant clericals employed by Respondent at its Bayshore facility engaged in the fabrication and/or manufacture of all ferrous and non-ferrous metals, iron, steel and other metal products, including plastic products, and all maintenance employees engaged in maintaining machinery and equipment and other maintenance work, excluding all office clerical employees, superintendents, or employees engaged in erection, installation or construction work.

(b) Failing and refusing to bargain collectively and in good faith with the Union, by unilaterally granting a wage increase without first notifying the Union and affording it a meaningful opportunity to bargain with respect to such change.

(c) Failing and refusing to bargain collectively and in good faith with the Union, by insisting as a condition of agreeing to terms of a successor collective-bargaining agreement that the Union agree to withdraw a National Labor Relations Board complaint, a demand for a trust fund audit, a pending arbitration, or other nonmandatory proposals.

(d) Failing and refusing to bargain collectively and in good faith with the Union, by raising issues that had been agreed upon during the course of collective bargaining.

(e) Failing and refusing to bargain collectively and in good faith with the Union, by refusing to execute the 2002–2005 collective-bargaining agreement, although the terms and conditions of employment had been agreed upon.

(f) Threatening unit employees with layoff or discharge because the Union had received a favorable arbitration award, or because they engage in activities on behalf of the Union.

(g) Threatening unit employees that union agents could no longer visit the Respondent's facility for the purpose of policing and enforcing its collective-bargaining agreement with the Union, notwithstanding a broad visitation clause.

(h) Summoning law enforcement officials to remove union agents visiting the Respondent's facility for the purpose of policing and enforcing its collective-bargaining agreement with the Union, notwithstanding a broad visitation clause.

(i) Discharging or laying off employees because of their membership in, or activities on behalf of, the Union.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish the Union with the information requested as set forth above.

(b) Notify the Union in advance of any proposed changes in mandatory subjects of bargaining, obtain the Union's consent before implementing changes to such subjects contained in the parties' collective-bargaining agreement, and bargain collectively and in good faith, upon request by the Union.

(c) Upon request by the Union, rescind the unilateral wage increase granted in August 2002.

(d) Execute the 2002–2005 collective-bargaining agreement as requested by the Union.

(e) Give retroactive effect to the terms and conditions of the collective-bargaining agreement and make whole its employees and the Union for any losses they may have suffered by reason of the Respondent's refusal to execute the agreement, as set forth in the remedy section of the decision.

(f) Within 14 days from the date of this Order, offer John Miranda full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any rights or privileges previously enjoyed.

(g) Make John Miranda whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(h) Within 14 days from the date of this Order, remove from its files any reference to its unlawful discharge of John Miranda, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(i) Preserve and, within 14 days of a request, or within such additional time as the Regional Director may allow for good cause shown, provide for examination and copying at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its Bayshore, New York facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and main-

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since Spring 2001, the approximate date of the first unfair labor practice found herein.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 30, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to provide the Union, as it requested in the spring of 2001 and August 2001, the names, dates of hire, classifications, and rates of pay of unit employees; as it requested in March 2002, the names and dates of hire of all unit employees, including those on layoff; as it requested on April 11, 2002, a list of job functions performed by each unit employee during the past 3-year period, a list of vacation, holiday, sick leave, and overtime pay received by each employee during the past 3-year period, records showing medical coverage supplied by us to unit employees, including copies of individual employees' medical cards, and a list of benefit payments made to unit employees during the last 3 years; as it requested on September 4, 2002, a list of unit employees who received unilateral wage increases, and the amount of such increase during August 2002; all of which information is relevant and necessary for the performance of its duties as the collective-bargaining representative of the employees in the following bargaining unit:

> All production and maintenance employees including plant clericals employed by us at our Bayshore facility engaged in the fabrication and/or manufacture of all ferrous and non-ferrous metals, iron, steel and other metal products, including plastic products, and all maintenance employees engaged in maintaining machinery and equipment and other maintenance work, excluding all office clerical employees, superintendents, or employees engaged in erection, installation or construction work.

WE WILL NOT fail and refuse to bargain collectively and in good faith with the Union, by unilaterally granting a wage increase without first notifying the Union and affording it a meaningful opportunity to bargain with respect to such change.

WE WILL NOT fail and refuse to bargain collectively and in good faith with the Union, by insisting as a condition of agreeing to terms of a successor collective-bargaining agreement that the Union agree to withdraw a Board complaint, a demand for a trust fund audit, a pending arbitration, or other nonmandatory proposals.

WE WILL NOT fail and refuse to bargain collectively and in good faith with the Union, by raising issues that had been agreed upon during the course of collective bargaining.

WE WILL NOT fail and refuse to bargain collectively and in good faith with the Union, by refusing to execute the 2002–2005 collective-bargaining agreement, although the terms and conditions of employment had been agreed upon.

WE WILL NOT threaten you with layoff or discharge because the Union had received a favorable arbitration

award, or because you engage in activities on behalf of the Union.

WE WILL NOT threaten you that union agents can no longer visit our facility for the purpose of policing and enforcing our collective-bargaining agreement with the Union, notwithstanding a broad visitation clause.

WE WILL NOT summon law enforcement officials to remove union agents visiting our facility for the purpose of policing and enforcing our collective-bargaining agreement with the Union, notwithstanding a broad visitation clause.

WE WILL NOT discharge or lay off employees because of their membership in, or activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

WE WILL furnish the Union with the information requested as set forth above.

WE WILL notify the Union in advance of any proposed changes in mandatory subjects of bargaining, obtain the Union's consent before implementing changes to such subjects contained in the parties' collective-bargaining agreement, and bargain collectively and in good faith, upon request by the Union.

WE WILL, upon request by the Union, rescind the unilateral wage increase granted in August 2002.

WE WILL execute the 2002–2005 collective-bargaining agreement as requested by the Union.

WE WILL give retroactive effect to the terms and conditions of the collective-bargaining agreement and make you and the Union whole for any losses you may have suffered by reason of our refusal to execute the agreement.

WE WILL, within 14 days from the date of the Board's Order, offer John Miranda full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any rights or privileges previously enjoyed.

WE WILL make John Miranda whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful discharge of John Miranda, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

JERRY CARDULLO IRONWORKS, INC.

*James P. Kearns, Esq.*, for the General Counsel.
*Alan B. Pearl, Esq. (Portnoy, Messinger & Pearl),* for the Respondent.
*Belle Harper, Esq.*, for the Charging Party.

## DECISION*

### STATEMENT OF THE CASE

### FINDINGS OF FACT AND ANALYSIS AND CONCLUSIONS OF LAW

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on January 29, 2003, in Brooklyn, New York.

Upon unfair labor practice charges filed by Shopmen's Local Union No. 455, International Association of Bridge Structural, Ornamental & Reinforcing Iron Workers, AFL–CIO (the Union), a complaint issued on January 7, 2003, alleging that the Respondent, Jerry Cardullo Ironworks Inc., violated Section 8(a)(1), (3), and (5) of the Act.

Based upon the entire record herein, the briefs submitted by counsel for the General Counsel and Respondent's counsel, and my observation of the demeanor of the witnesses, I make the following

Based upon the overall demeanor of William Colavito, union president, and Jerry Cardullo, Respondent's president and owner, I find Colavito to be a credible witness. I also find Cardullo to be an incredible witness. In this connection, Colavitos' testimony was very detailed, and established an excellent recollection of the facts, especially concerning the collective-bargaining negotiations. He was extremely responsive to questions put to him on cross-examination. Moreover, his testimony on cross-examination was consistent with his direct testimony. In contrast, Cardullos' testimony was not as detailed as Colavitos' testimony. At times he impressed me as being evasive, especially during cross-examination. Moreover, as set forth in detail below, his testimony was inconsistent with his own records. At other times his testimony was not believable on its face. Accordingly, when Cardullos' testimony is inconsistent with that of Colavito, I credit Colavito. Colavito and Cardullo were the only witnesses in this case.

Respondent is a domestic corporation with its principle office and place of business in Bayshore, and Long Island, New York, where it is engaged in the business of iron fabrication. Respondent annually purchases and receives at its Bayshore facility goods valued in excess of $50,000 directly from points located in States other then the State of New York. It is admitted that Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent and the Union have had a series of collective-bargaining agreements for about 25 years, covering a bargaining unit of:

> All production and maintenance employees including plant clericals employed by Respondent at its Bay Shore facility engaged in the fabrication and/or manufacture of all ferrous

* Corrections have been made according to an errata issued on June 18, 2003.

and non-ferrous metals, iron, steel and other metal products, including plastic products, and all maintenance employees engaged in maintaining machinery and equipment and other maintenance work, excluding all office clerical employees, superintendents, or employees engaged in erection, installation or construction work.

At all material times herein the Union has been the exclusive collective-bargaining representative of the unit described above.

It is also admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act. The Union has had a series of collective-bargaining agreements with Respondent for over 25 years. William Colavito, president of the Union, and Jerry Cardullo, Respondent's owner, negotiated these collective-bargaining agreements. The last agreement expired on June 30, 2002.

The parties had a broad visitation-rights clause in their agreements and a practice where Colavito, who serviced the shop, could visit the employees in the working areas of the shop as long as he didn't interfere with production. During the spring of 2001, Colavito made an unannounced visit to Respondent's shop. At this time he observed about 20 unit employees working in unit positions. The parties' collective-bargaining agreement requires Respondent to hire through its hiring hall. The Union's hiring hall records indicated only eight unit employees. Respondent also had an obligation under the agreement's fund provision to similarly provide the fund with the same list of employees. Colavito went into the office and confronted Cardullo about these additional employees and asked him for a full list of names. Notwithstanding this request, Cardullo then wrote a list of 16 employees stating only their first name. He never supplied the Union with a full list including first and last names.

It is well settled that an employer has a duty to furnish the representative of employees covered under a collective-bargaining agreement with information relevant and necessary to enforce and administer its collective-bargaining agreement. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). A list of an employer's employees, dates of employment, duties, wage rates, etc., covered by a collective bargaining is presumptively relevant. *American Logistics, Inc.*, 328 NLRB 443 (1999). I find the Respondent's response to the Union's request nonresponsive. And although Colavito made other requests for such information, it was never supplied. I find such conduct in violation of Section 8(a)(1) and (5) of the Act.

In August 2001, Colavito again learned that Respondent hired an undisclosed number of unit employees. Colavito promptly called Cardullo and told him he knew that he had hired new employees and requested the names, classifications, dates of hire, rates of pay, etc. Notwithstanding such request, Cardullo never furnished the requested information. I find such refusal to be in violation of Section 8(a)(1) and (5) of the Act.

In March 2002, employee John Miranda told Colavito that he had been laid off. Colavito called Cardullo and asked why Miranda wasn't working. Cardullo told him work was slow. Colavito asked him to supply him with a list of the names and dates of all employees, including those employees on layoff. This information was not provided. I find such refusal to be in violation of Section 8(a)(1) and (5) of the Act.

The Union subsequently filed for arbitration over Respondent's repeated failure to call the union hiring hall for new hires. Thereafter, the Union received a favorable arbitrators decision. As a result of this decision, the Union sent Respondent a letter dated April 11 requesting that Respondent supply it with the following information:

1. A list of job functions performed by each unit employee during the past 3 year period.

2. A list of vacation, holiday sick leave and overtime pay received by each unit employee during the past 3 year period.

3. Records showing medical coverage supplied by Respondent to the unit employees, including copies of individual employees' medical cards and a list of benefit payments made to the unit employees during the past three year period.

This letter was sent certified and received by Respondent. Notwithstanding such request, Respondent never furnished the Union with the requested information. I find such conduct in violation of Section 8(a)(1) and (5) of the Act. *Acme Industrial*, supra.

Collective-bargaining negotiations began in June 2002. The parties had a total of nine bargaining sessions. On September 4, 2002, during one of these bargaining sessions, Colavito found out that Cardullo had given some unit employees raises in pay without notifying or discussing it with the Union. Colavito asked Cardullo for the names of the employees who received such raises and the amounts of such raise. Cardullo refused to supply such information. I find such conduct in violation of Section 8(a)(1) and (5) of the Act. Moreover, unilateral changes during the course of collective bargaining concerning matters that are mandatory subjects of bargaining are regarded as per se refusals to bargain. Accordingly, I find the granting of such raises and the refusal by Respondent to supply the names of those employees receiving such raises and the amounts thereof to be in violation of Section 8(a)(1) and (5) of the Act.

At the end of the September 4 bargaining session Colavito met with about 12 of the unit employees, on Respondent's front lawn, reporting what took place during this session.

Colavito turned and saw Cardullo behind him. Colavito had no knowledge as to how long Cardullo had been there or whether he heard anything. No other witnesses testified as to this incident. As described above, Cardullo was on his own property and it was summertime. I find insufficient evidence to support this complaint allegation of surveillance.

During the September 4 negotiation, Cardullo conditioned an agreement of a collective-bargaining agreement on the Union's withdrawal of an outstanding Board complaint, the withdrawal of the Union's demand for a trust fund audit, and the withdrawal of the John Miranda arbitration. On cross-examination Cardullo admitted to such bargaining demands. Conditioning an agreement on nonmandatory subjects is a violation of Section 8(a)(1) and (5) of the Act. *NLRB v. Borg-Warner Corp.*,

356 U.S. 324 (1958). Accordingly, I find that Respondent violated Section 8(a)(1) and (5) of the Act.

The parties next met on September 11. Although it is admitted that Respondent had agreed to most of the terms of a new collective-bargaining agreement, except as to four items described below, Cardullo suddenly disagreed as to terms he had always agreed to in prior agreements. In this regard, Colavito credibly testified as follows:

> Q. All right. I think you said the next meeting was September 11th?
>
> A. I think it was around that time.
>
> Q. What, if anything, happened that day?
>
> A. Well, he had the same objections in terms of the, the proposal. But then he went, took the contract. He had the contract in front of him. He went and started turning page by page, and he started raising one issue after another, which he had never raised before.
>
> Q. He had the contract that expired 2002?
>
> A. Yes. He raised the question of the bargaining unit. He raised the question of some people to be excluded from the bargaining unit. Holidays, eligibility for holidays, he didn't want what was in the contract. The hiring hall, he didn't want in the contact. Shoes, he didn't want in the contract. He went through, I think, about half the contract, raising one issue after another.
>
> Q. And had he ever raised any of these issues at earlier sessions?
>
> A. No, he did not.
>
> Q. And just shoes, you say, what did you mean by that?
>
> A. Well, it provides for a pair of work shoes once a year course [sic] of a pair of work shoes, the company provides that.
>
> Q. And what did he say about the hiring hall?
>
> A. He wanted, didn't want to have to call the hall for people.
>
> Q. And what eligibility did he want for holidays?
>
> A. Well, if a man was sick or a man on compensation, you know, it provides for if the holiday falls within a certain time, well, then the man gets his holiday. He wanted that eliminated.
>
> Q. Do you recall discussing anything else or any other issues he raised?
>
> A. Holidays, he wanted to eliminate the holidays. But I'm talking about the new issues. I don't remember, at this point.
>
> Q. And did you respond?
>
> A. Yes. You know, I said—raising all new issues, they were not an issue before, and you look like he's just looking to make, stall these negotiations.

I find that Respondent, by raising issues that had never been raised in the parties 25-year bargaining history, so late in these bargaining negotiations, such as the composition of the bargaining unit, the elimination of the hiring hall, and the elimination of holidays, establishes an effort to undermine the Union and frustrate the bargaining process. I find such conduct in violation of Section 8(a)(1) and (5) of the Act. *Yearbook House,* 223 NLRB 1456, 1465 (1976).

The Union contends that on or about September 25, the parties had reached an agreement as to all terms and conditions of a collective-bargaining agreement. Respondent contends that there were 4 items to which agreement had not been reached. According to Respondent's attorney, Respondent had conditioned agreement on the inclusion of a drug testing policy and disciplinary system. The elimination of a holiday, Respondent contending that the holiday to be eliminated should be Lincoln's Birthday, rather than Election Day. Finally, that the effective date of the wage increase was not decided.

With respect to the drug testing and disciplinary policies, Cardullo testified on direct examination that he wanted it included in the collective-bargaining agreement. However, on cross-examination he admitted that he had agreed with Colavito to have a separate agreement concerning both the drug and disciplinary policies. His contradictory testimony on such a major issue seriously affects his credibility I conclude that both of these issues were not to be included in the parties' collective-bargaining agreement, but rather in a separate agreement to be worked out later.

With respect to the effective date of the wage increases Colavito credibly testified that during the negotiations he observed Cardullo computing the cost of such increases as of July 1, 2002. Moreover, the parties past practice was to make the wage increases retroactive to the expiration of the prior agreement. Cardullo testified on direct examination that it was not the practice of Respondent to have retroactive wage increases in their collective-bargaining agreements. However, as set forth above the last collective-bargaining agreement was retroactive. In view of the documentary evidence, and in view of the past practice, I find Cardullo's testimony unbelievable, and not credible. Moreover, as set forth above I find Colavito's testimony entirely credible.

Accordingly, I find that it was agreed that the wage increases were to be effective as of July 1, 2002.

The only remaining issue to be decided is the holidays. In view of my favorable impression as to Colavito's credibility, and my very unfavorable impression as to Cardullo's credibility, I credit Colavito's testimony. Colavito testified that although the Union was willing to lose a day off, the Union felt strongly about keeping Lincoln's Birthday as a holiday. Colavito testified that sometime during an August meeting the parties agreed that Election Day would be deleted as a paid holiday and each employee would be entitled to receive a paid personal day for each year of the contract.

On September 25, the parties reached an agreement. Colavito told Cardullo that he would draw up a stipulation. A few days later Colavito met with Cardullo and gave him a copy of the stipulation. Cardullo read it and said that it looked all right and that he would give it to his lawyer to look at. Cardullo, although requested, has refused to sign the stipulation. The stipulation is set forth below. The stipulation is simple to read and understand at a glance. There could be no misunderstanding as to the terms set forth therein.

*Stipulation Between Jerry Cardullo Ironworks and Ironworkers Local 455*

It is hereby stipulated and agreed by and between Jerry Cardullo Iron Works Inc. (Company) and Ironworkers Local Union 455—IABSO—RIW (Union) that the contract between the Parties which by the terms expires June 30, 2002 is hereby extended with the following modifications:

1) Election Day shall be deleted as a paid holiday and each employee shall be entitled and receive for each year of the contract a paid Personal Day.

2) Wage rates of each employee and the minimum rates of each classification shall be increased as set forth below:

*Effective for Finishers and Mechanics*

| July 1, 2002 | July 1, 2003 | July 1, 2004 |
|---|---|---|
| 6% | 5% | 6% |

*Effective for all other classifications*

| July 1, 2002 | July 1, 2003 | July 1, 2004 |
|---|---|---|
| 4% | 4% | 4% |

3) Contract Termination: June 30, 2005

4) The Parties will agree on:

a) Work Rules

b) Substance Abuse Testing Program

Accordingly, I conclude that by refusing to sign the stipulation of agreement, Respondent has violated Section 8(a)(1) and (5) of the Act.

John Miranda, a unit employee began working for Respondent in August 2000. He took a leave of absence during the winter of 2001. When he attempted to return to work on December 9, 2002, Cardullo refused to reinstate him. The Union thereafter filed for arbitration on his behalf. The Union refused to withdraw its arbitration, and ultimately received a favorable award requiring Cardullo to reinstate Miranda. Cardullo was admittedly furious over the award.

On December 6, 2002, shortly after the arbitration award, Colavito visited Respondent's facility to discuss Miranda's reinstatement. Cardullo yelled at Colavito in the presence of the unit employees. His anger was directed at the arbitrators award. In this connection, Cardullo threatened Colavito in the presence of unit employees that he would lay off five employees because the Union intended to enforce the arbitration award, and that he would let Miranda go after working 1 day. Cardullo then told Colavito in the presence of unit employees that he could no longer come into Respondent's facility, notwithstanding a contractual agreement which provides that: "Union agents are permitted to enter Respondent's facility at any time during which employees are working for the purpose investigating complaints or working conditions." Cardullo then called the police and had Colavito removed from his facility. I find that such conduct was in violation of Section 8(a)(1) and (5) of the Act. *West Lawrence Care Center*, 308 NLRB 1011, 1015 (1992). I also find that his threats to lay off five employees if the Union enforced the arbitrator's award is a violation of Section 8(a)(1) of the Act.

On December 9, Miranda came back to work. Inside Respondent's facility, Cardullo told Miranda that he didn't know why he was there and why he was fighting to return. Cardullo admitted on cross-examination that he intended to terminate him after working 1 day. When Miranda completed his workday, Cardullo told him he was being laid off.

At trial, Cardullo contended that he let Miranda go because he was the least senior employee. On direct examination, he testified that there were no less senior employees than Miranda currently working for Respondent. However, once again Respondent's records contradict his testimony. The seniority list offered by Respondent establishes that at the time of his termination there were several employees with less seniority then Miranda who were not laid off. At the day of trial, Respondent's records establish that six employees with less seniority than Miranda were working. Once again Cardullo's testimony is contradicted by his own records.

Under the Board's decision in *Wright Line*, 251 NLRB 1083 (1980), approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the General Counsel must make a prima facie showing of sufficient evidence to support the inference that protected conduct was a motivating factor in the employer's decision to terminate, suspend or otherwise discipline an employee. Once this is established the burden then shifts to the employer to demonstrate that the same action would have been taken even in the absence of protected conduct. The question, then, is not whether the employer could have taken the adverse action, but whether it would have done so in the absence of the discriminatee's union activities. *Standard Sheet Metal, Inc.*, 326 NLRB 411 (1998). Thus, Respondent must persuade by a preponderance of the credible evidence that it would have taken the actions described herein in the absence of each discriminatee's protected activities in support of the Union. *T&J Trucking, Co.*, 316 NLRB 771 (1995).

The evidence clearly establishes a prima facie case that Respondent discharged John Miranda in violation of Section 8(a)(3) of the Act. A prima facie showing of discriminatory conduct under Section 8(a)(3) of the Act requires the following: (1) that the alleged discriminatee be engaged in union activity; (2) that the employer had knowledge of these activities; (3) that the employer's actions were motivated by union animus; and (4) that the discrimination had the effect of encouraging or discouraging union membership. *Downtown Toyota*, 276 NLRB 999, 1014 (1985), citing *NLRB v. Transportation Management Corp.*, supra; *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S, 599 (1982).

It is clear that by Cardullo's conduct, his December 6 threats to lay off unit employees because of his anger at the Miranda arbitration award, his threats to terminate Miranda, and his admission during the course of this trial that he intended to terminate Miranda after working 1 day establish a strong prima facie case. Respondent's defense that Miranda was laid off due to economic conditions is contradicted by his own records and admissions. Accordingly, I conclude that Respondent's defense is pretextual. I further conclude that Miranda was terminated in violation of Section 8(a)(1) and (3) of the Act.

REMEDY

Having found Respondent has committed violations of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it shall be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I recommend that Respondent be ordered to execute the 2002–2004 collective-bargaining agreement requested by the Union on September 25, 2002. I further recommend Respondent be ordered to comply with the terms of the prior agreement retroactive to July 1, 2002, the effective date of the agreed upon collective-bargaining agreement, described above, and make the bargaining unit employees and the Union whole for any losses they may have suffered as a result of Respondent's refusal to execute this agreement in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I recommend that Respondent furnish the Union with the information requested by the Union in March, on April 11, and on September 4 2002, all of which is necessary and relevant to the Union's performance of it's duties as the exclusive bargaining representative of the unit employees.

I also recommend that the Union, at it's option, may request Respondent rescind it's unilateral grant of a wage increase to the unit employees granted on August 2002. Such remedy is necessary because such unilateral action denigrates the Union in the eyes of the unit employees.

I recommend that Respondent notify the Union of any proposed changes in mandatory subjects of bargaining and obtain the Union's consent before implementing such changes contained in the parties collective-bargaining agreement and bargain in good faith upon request by the Union.

With respect to the unlawful discharge of John Miranda, I shall recommend that Miranda be offered unconditional reinstatement to his former position of employment, or if such position no longer exists, to a substantially equivalent position of employment without prejudice to his seniority, or other rights previously enjoyed by him. I shall further recommend that Miranda must be made whole for any loss of earnings or other benefits suffered as a result of his unlawful discharge, from the date of his discharge, until the date a valid offer of reinstatement, as defined by the Board, is made by Respondent. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, supra, with interest as prescribed by *New Horizons for the Retarded*, supra. In addition, Respondent must be ordered to remove from Miranda's personnel file, any reference to such action and notify Miranda that this has been done and that this personnel action will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Jerry Cardullo Ironworks, Inc., Bayshore, and Long Island, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide to the Union, upon request in March 2002, the names and hire dates of all unit employees, including those on layoff; upon request on April 11, a list of job functions performed by each unit employee during the past 3-year period, a list of vacation, holiday, sick leave, and overtime pay received by each employee during the past 3-year period, records showing medical coverage supplied by Respondent to unit employees, including copies of individual employees' medical cards, and a list of benefit payments made to unit employees during the last 3 years; upon request on September 4, 2002, a list of unit employees who received unilateral wage increases, and the amount of such increase during the spring and summer of 2002; all of which information is relevant and necessary for the performance of its duties as the collective-bargaining representative of the unit employees described below.

(b) Failing or refusing to bargain collectively and in good faith with the Union, by unilaterally granting a wage increase without first notifying the Union and affording it a meaningful opportunity to bargain with respect to such change.

(c) Failing or refusing to bargain collectively and in good faith with the Union, by insisting as a condition of agreeing to terms of a successor collective-bargaining agreement that the Union agree to withdraw a Board complaint, a demand for a trust fund audit, a pending arbitration, or other nonmandatory proposals.

(d) Failing or refusing to bargain collectively and in good faith with the Union, by raising issues that had been agreed upon during the course of collective bargaining.

(e) Failing or refusing to bargain collectively and in good faith with the Union, by refusing to execute the 2002–2004 collective-bargaining agreement although all terms and conditions of employment had been agreed upon.

(f) Threatening unit employees with layoff or discharge because the Union had received a favorable arbitration award, or because they engage in activities on behalf of the Union.

(g) Threatening unit employees that union agents could no longer visit Respondent's facility for the purpose of policing and enforcing its collective bargaining agreement, notwithstanding an unlimited visitation clause.

(h) Summoning law enforcement officials to remove union agents visiting Respondent's facility for the purpose of policing and enforcing its collective-bargaining agreement with the Union, notwithstanding an unlimited visitation clause.

(i) Discharging or laying off employees because of their membership in, or activities on behalf of the Union.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Execute the 2002–2004 collective-bargaining agreement as requested by the Union.

(b) Give retroactive effect to the terms and conditions of the collective-bargaining agreement and make whole its employees and the Union for any losses they may have suffered by reason

of Respondent's refusal to execute the collective-bargaining agreement as set forth in the remedy section of the decision.

(c) Furnish the Union with the information requested as set forth above in the recommended Order.

(d) On request by the Union, rescind the unilateral wage increase granted in August 2000.

(e) Notify the Union in advance of any proposed changes in mandatory subjects of bargaining, obtain the Union's consent before implementing changes to such subjects contained in the parties' collective-bargaining agreement and bargain collectively and in good faith, upon request by the Union.

(f) Within 14 days of the date of this Order make an unconditional offer of reinstatement to John Miranda to his former position of employment, or if such position does not exist to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges previously enjoyed.

(g) Within 14 days of the date of this Order, make whole John Miranda in the manner set forth in the remedy provision of this decision from the date of his discharge until an unconditional offer of reinstatement is made.

(h) Within 14 days of this Order, remove from Miranda's file any reference to his unlawful discharge, and notify him in writing that this has been done and that his personnel actions will not be used against him in any way.

(i) Within 14 days after service by the Region, post at its Bayshore, Long Island, New York facility copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 30, 2003

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to provide to the Union, upon request the information requested in March 2002, the names and hire dates of all unit employees, including those on layoff; April 11, a list of job functions performed by each unit employee during the past 3-year period, a list of vacation, holiday, sick leave, and overtime pay received by each employee during the past 3-year period, records showing medical coverage supplied by our Company to unit employees, including copies of individual employees' medical cards, and a list of benefit payments made to unit employees during the last 3 years; on September 4, 2002, a list of unit employees who received unilateral wage increases, and the amount of such increase during the spring and summer of 2002; all of which information is relevant and necessary for the performance of its duties as the collective-bargaining representative of the unit employees described below.

WE WILL NOT fail or refuse to bargain collectively and in good faith with the Union, by unilaterally granting a wage increase without first notifying the Union and affording it a meaningful opportunity to bargain with respect to such change.

WE WILL NOT fail or refuse to bargain collectively and in good faith with the Union, by insisting as a condition of agreeing to terms of a successor collective-bargaining agreement that the Union agree to withdraw a Board complaint, a demand for a trust fund audit, a pending arbitration, or other nonmandatory proposals.

WE WILL NOT fail or refuse to bargain collectively and in good faith with the Union, by raising issues that had been agreed upon during the course of collective bargaining.

WE WILL NOT fail or refuse to bargain collectively and in good faith with the Union, by refusing to execute the 2002–2004 collective-bargaining agreement although all terms and conditions of employment had been agreed upon.

WE WILL NOT threaten our unit employees with layoff or discharge because the Union receives a favorable arbitration award, or because they engage in activities on behalf of the Union.

WE WILL NOT threaten our unit employees that union agents can no longer visit our facility for the purpose of policing and enforcing its collective-bargaining agreement, notwithstanding an unlimited visitation clause.

WE WILL NOT summon law enforcement officials to remove union agents visiting our facility for the purpose of policing and enforcing its collective-bargaining agreement with the Union notwithstanding an unlimited visitation clause.

WE WILL NOT discharge, or lay off employees because of their membership in, or activities on behalf of the Union.

WE WILL execute the 2002–2004 collective-bargaining agreement as requested by the Union.

WE WILL give retroactive effect to the terms and conditions of the 2002–2004 collective-bargaining agreement and make

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

whole our employees and the Union for any losses they may have suffered by reason of our refusal to execute the collective-bargaining agreement as set forth also in the remedy section of this decision.

WE WILL furnish the Union with the information requested as set forth above.

WE WILL on request by the Union, rescind the unilateral wage increase granted in August 2000.

WE WILL notify the Union in advance of any proposed changes in mandatory subjects of bargaining, obtain the Union's consent before implementing changes to such subjects contained in the collective-bargaining agreement and bargain collectively and in good faith, upon request by the Union.

WE WILL within 14 days of the date of this Order make an unconditional offer of reinstatement to John Miranda to his former position of employment, or if such position does not exist to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL within 14 days of the date of this Order, make whole John Miranda in the manner set forth in the remedy provision of this decision from the date of his discharge until an unconditional offer of reinstatement is made.

WE WILL within 14 days of this Order, remove from Miranda's file any reference to his unlawful discharge, and notify him in writing that this has been done and that his personnel actions will not be used against him in any way.

JERRY CARDULLO IRONWORKS, INC.